

Eldred, Golan and the Soul of Copyright

Howard B. Abrams

Professor of Law, University of Detroit Mercy School of Law
abramshb@udmercy.edu

The article explores the decisions in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), and *Golan v. Holder*, 565 U.S. ___, 132 S. Ct. 873, 181 L. Ed. 2d 835, No. 10-545 (U.S. Jan. 18, 2012), available at <http://www.supremecourt.gov/opinions/11pdf/10-545.pdf> and their impact on several issues. The first issue is the extent to which the Constitution's statement that the purpose of the power granted to Congress is "[t]o promote the Progress of Science," U.S. Const. art. I, § 8, cl. 8, constrains the scope of copyright statutes enacted by Congress, if at all. The second issue is the impact of these decisions, particularly *Golan*, on the intersection of copyright with the First Amendment's free speech provision.

Underlying these doctrinal inquiries is the question of the impact of Justice Ginsburg's majority opinions in both *Eldred* and *Golan* with their broad view of Congress's power under the Copyright Clause when a far narrower and more tailored judicial response would have upheld the legislation in question. What does this do to the public domain? The next obvious candidates for protection under the *Golan* doctrine are sound recordings fixed prior to February 1, 1978, and United States works that were forfeited for failure to comply with the formal requirements (notice, registration) of prior U.S. Copyright Law. But the language of *Golan* seems to invite even more removal of works from the public domain.

Beyond the confines of the ongoing copyright-free speech debate—it is not dead by any means—*Golan* has serious implications for future free speech decision making. *Golan*'s holding that no First Amendment scrutiny of copyright statutes is required because of the existence of the idea-expression distinction and the fair use doctrine already embodied in copyright law, raises the possibility, perhaps even the probability, that scrutiny, whether intermediate or heightened, will be bypassed, at least in the case of content neutral regulations of speech. Less broadly, *Golan*'s position that the copyright doctrines of fair use and the idea-expression distinction are adequate protection for free speech interests in the context of copyright will necessarily force a reexamination of these doctrines. It is submitted that this will be the most important short term effect of *Golan* for copyright practitioners.